BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TAMARA L. SIMMONS Claimant	)	
VS.	)	
UNITED PARCEL SERVICE Respondent	)	Docket No. **1,068,199**
AND	)	
LIBERTY INSURANCE CORPORATION Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the April 14, 2014, preliminary hearing Order for Medical Treatment entered by Administrative Law Judge (ALJ) Pamela Fuller. David Farris, of Wichita, Kansas, appeared for claimant. Karl Wenger, of Kansas City, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, with exhibits dated April 11, 2014, and all pleadings contained in the administrative file.

The ALJ found the following:

> The claimant was placed on restricted duty on January 13th, 2014, and that date shall be the date of accident[1], K.S.A. 44-508(e)(2). The claimant had already given notice on August 6th, 2013 and written notice was given by claimant's counsel on or about January 7th, 2014, (Claimant's Exhibit 5). Notice was timely. It is found that the claimant's work activities are the prevailing factor causing her injury and need for treatment based on the medical evidence provided.
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> Based on all the evidence presented, it is found that medical treatment with Dr. Melhorn is ordered to be provided and paid for by the respondent and its insurance carrier on claimant's behalf until further order or until certified as having

[1] Presumably the ALJ meant date of injury by repetitive trauma.

reached maximum medical improvement. Further, the claimant's request for payment of unauthorized medical should be and the same is hereby granted.[2]

ISSUES

Respondent's application for review lists as issues whether: (1) claimant's injury by repetitive trauma arose out of and in the course of her employment; and (2) the ALJ exceeded her authority and/or jurisdiction in granting claimant benefits. However, respondent's brief indicates the only issue on review is whether or not claimant gave timely notice of her injury by repetitive trauma.

Claimant argues the ALJ's Order should be affirmed.

Both parties, in their briefs, concur with the ALJ's finding claimant's date of injury by repetitive trauma was January 13, 2014.

The sole issue for Board determination is: did claimant provide timely notice of her injuries to respondent?

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

At the time of the preliminary hearing, claimant worked for respondent for 9½ years as a pre-loader. Her job duties included scanning, sorting and placing packages on a belt. The job required her to use her upper extremities repetitively during her shift.

Claimant testified she began having problems with her right wrist and/or arm in August 2013. Claimant's wrist bothered her and she noticed another[3] cyst on the top of her right wrist. She reported the cyst to respondent after noticing it. Claimant testified she spoke to her district supervisor, Randy Brooks, and told him of having problems in both arms. In September 2013, claimant testified she informed respondent's insurance adjustor reporting to Mr. Brooks on August 6, 2013, of having problems in both arms. The email from claimant to the insurance carrier stated: "My wrists started bothering around the end

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[2] ALJ Order at 2.

[3] Claimant testified she had a cyst on her right wrist in 2012 that was removed by Dr. Mohammad Amawi. After the cyst was removed in 2012, claimant was off work for a period of time, then released without restrictions.

of July, 2013 [sic]. I noticed the cyst on my right wrist the morning I reported to one of my supervisors, Randy Brooks. That was on August 6, 2013."[4] Claimant testified:

> Q. So when you initially talked with, I think you said Randy Brooks on August 6, did you also have a cyst on your left wrist?
>
> A. No
>
> Q. But by you telling him you had pain and numbness, you were telling him specifically only about the cyst?
>
> A. Yes.
>
> Q. Because you didn't have numbness, tingling and the problems that you relate to your carpal tunnel until two weeks later. There's no way you could have told him about those on the sixth?
>
> A. Yes, I didn't.[5]

On January 13, 2014, claimant, on her own, went to see Dr. Amawi for her right wrist issues. Claimant testified she informed Dr. Amawi of scanning packages at work and of having tingling and cramping in her right upper extremity. Claimant testified the tingling and cramping were different than the cyst and began shortly after the cyst developed. Dr. Amawi instructed claimant not to do any repetition with the right wrist and to wear a splint while working. Claimant testified she continued working for respondent. Dr. Amawi's notes indicated claimant had a recurrent ganglion cyst wrist dorsal aspect and he suspected right carpal tunnel syndrome.

Six days later, on January 20, 2014, claimant saw her family physician, Dr. A. W. Schowengerdt, who diagnosed claimant with bilateral carpal tunnel syndrome and a recurrent ganglion cyst, right dorsal wrist. He indicated claimant had a cyst removed on October 9, 2012. The doctor recommended a nerve conduction test, but the test was not performed. On cross-examination, claimant admitted she did not report the bilateral carpal tunnel to respondent nor complete an additional accident report after she learned of having bilateral carpal tunnel from Dr. Schowengerdt.

Claimant's attorney sent a Notice of Intent dated January 7, 2014 to respondent stating:

> Please be advised that Tamara L. Simmons sustained injuries to her upper extremities arising out of and in the course of employment with UPS on or about

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[4] P.H. Trans., Cl. Ex. 4.

[5] *Id.* at 21.

August 5, 2013 and each and every working day thereafter as a result of repetitively using a scanner.[6]

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[7] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[8]

K.S.A. 2013 Supp. 44-520 states:

> (a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
>
> (A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;
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> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
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> (C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.
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> Notice may be given orally or in writing.
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> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

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[6] *Id.*, Cl. Ex. 5.

[7] K.S.A. 2013 Supp. 44-501b(c).

[8] K.S.A. 2013 Supp. 44-508(h)

> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
>
> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

The ALJ found and both parties agreed claimant's date of injury was January 13, 2014, the date Dr. Amawi placed claimant on restricted duty. Respondent argues claimant had two injuries, a ganglion cyst on her right wrist and bilateral carpal tunnel syndrome. Respondent asserts claimant gave timely oral notice to Mr. Brooks of the ganglion cyst, but did not notify Mr. Brooks of her bilateral carpal tunnel syndrome.

As the Court of Appeals noted in *De La Luz-Guzman-Lepe,*[9] appellate courts are ill-suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder. "One of the reasons that appellate courts did not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful."[10]

Here, the ALJ had the opportunity to assess claimant's testimony. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony. Based upon the evidence presented, the ALJ concluded claimant presented sufficient evidence to prove she gave oral notice of her injuries by repetitive trauma to her bilateral upper extremities to Mr. Brooks on August 6, 2013. This Board Member concurs.

Respondent asserts claimant admitted not providing timely notice of her injury by repetitive trauma within 20 days after she first received medical treatment for her injury by Dr. Amawi on January 13, 2014. Respondent contends the Notice of Intent sent by claimant's attorney dated January 7, 2014, was not timely notice as it was sent to respondent prior to claimant's date of injury by repetitive trauma. According to respondent, the plain and unambiguous language of K.S.A. 2013 Supp. 44-520(a) requires that notice of an injury by repetitive trauma must given 20 days **from** the date claimant was first treated for her injury by Dr. Amawi. This Board Member disagrees.

K.S.A. 2013 Supp. 44-520(a) provides that notice of an injury by accident must be given **by** the earliest of the three dates. One of those dates is 20 calendar days from the

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[9] *De La Luz-Guzman-Lepe v. National Beef Packing Company,* No. 103,869, unpublished Kansas Court of Appeals opinion, 2011 WL 1878130 (Kan. App. filed May 6, 2011).

[10] *State v. Scaife,* 286 Kan. 614, 624, 186 P. 3d. 755 (2008)

date the injured worker is provided medical treatment for his or her work injury. Another, is 20 days from the date of injury. In this instance, both of those dates fall on January 13, 2014.

In *Damron,*[11] notice was given by Damron to her employer of repetitive bilateral upper extremity injuries prior to her date of accident, which was September 6, 2007. At that time, K.S.A. 44-520, in part, stated:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary.

The Board in *Damron* held: "The Board finds that claimant is not required to renotify respondent of work-related injuries after the legal date of accident, when claimant has already provided timely notice."

This Board Member concludes claimant provided timely oral notice to her supervisor of her bilateral upper extremity injuries on August 6, 2013, and timely written notice, via her attorney's Notice of Intent. It is not necessary for an injured worker to wait until after the date of injury to notify his or her employer of a work accident or injury. The date of injury by repetitive trauma is a legal fiction[12] and is determined by statute.[13] Most injured workers will likely not know the statutory date of injury by repetitive trauma. Moreover, if an injured worker notifies his or her employer of an injury by repetitive trauma as soon as symptoms become evident, the employer can take steps to minimize the injury.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[14] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[15]

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[11] *Damron v. State of Kansas,* No. 1,039,526 (Kansas Court of Appeals unpublished opinion filed April 25, 2014).

[12] *Pyeatt v. Roadway Express, Inc.,* 243 Kan. 200, 205, 756 P.2d 438 (1988).

[13] K.S.A. 2013 Supp. 44-508(e).

[14] K.S.A. 44-534a.

[15] K.S.A. 2013 Supp. 44-555c(j).

WHEREFORE, the undersigned Board Member finds that the April 14, 2014, preliminary hearing Order for Medical Treatment entered by ALJ Pamela Fuller is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2014.

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HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Hon. Pamela Fuller, ALJ